92-436

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

VINCENT JAMES LANDANO,

Petitioner,

v.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether probable innocence of a habeas petitioner is a factor that ought to be considered in determining whether extraordinary circumstances exist justifying a federal grant of bail pending exhaustion of state remedies?

PARTIES TO THE PROCEEDING

Petitioner, the habeas petitioner below, is Vincent James Landano. Respondents, referred to collectively as the "State" herein, are John J. Rafferty, Superintendent of Rahway State Prison, Irwin I. Kimmelman, Former Attorney General of New Jersey, Peter Perretti, former Attorney General of New Jersey, Leslie Faye Schwartz, a Deputy Attorney General, the Office of the Hudson County Prosecutor, the Kearny, Newark, Jersey City and Perth Amboy Police Departments, and Robert Del Tufo, the current New Jersey Attorney General.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Vincent James Landano, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals appears at App., 1 to 35. The two opinions of the district court appear at App., 36 to 44 and 45 to 66. The district court's opinion of February 4, 1992, is reported at *Landano v. Rafferty*, 782 F.Supp. 986 (D.N.J. 1992).

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1992. As petition for rehearing was denied on August 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

This matter involves a district court's common law power to grant bail and does not involve any matters of statutory construction.

STATEMENT

1. This is a habeas corpus matter that arises from a grant of bail to the petitioner, Vincent James Landano, by a United States District Court pending exhaustion of state remedies.

2. The Third Circuit reversed and vacated that grant of bail concluding that while federal bail may be granted in extraordinary circumstances, here no such circumstances pertain.

3. Most important, the Circuit Court ruled that two factors relied upon centrally by the district court in granting bail, Mr. Landano's probable innocence and the complete absence of any state bail remedy during collateral state proceedings regardless of innocence, are irrelevant as a matter of law in determining whether or not extraordinary circumstances exist.

4. Circuit Judge Scirica, dissenting, would have affirmed, noting that this Court, in various decisions, has concluded that where there is a showing of probable innocence, procedural barriers to federal habeas corpus erected by this Court in the interests of federalism and comity should be relaxed to avoid manifest injustice. (App., 30 to 35)

5. The procedural history of this case is lengthy and complex. It is accurately detailed in the opinion below at App., 5 to 18. The history essential to this Petition is as follows: Following conviction by a New Jersey State jury in May of 1977 for the murder of a Newark, New Jersey police officer, John Snow, during the course of an armed robbery, the petitioner was sentenced to a term of life imprisonment and a consecutive seven to fifteen year

term for related offenses. Petitioner's direct appeals were unsuccessful and two state collateral attacks upon the conviction, in 1978 and 1982, were unsuccessful. Thereafter, in October of 1985, petitioner filed a federal petition for habeas corpus in the United States District Court for the District of New Jersey.

In 1987, the district court reluctantly denied a writ of habeas corpus, citing its obligation to defer to adverse state court factual findings and expressing the court's fear that an injustice might have resulted from denial of the writ. *Landano v. Rafferty*, 670 F.Supp. 570 (D.N.J. 1987), *aff'd*. 856 F.2d 569 (3d Cir. 1988), *cert. denied* 489 U.S. 1014.

Thereafter, the petitioner discovered and presented to the district court new evidence, previously suppressed by the State, demonstrating that a co-defendant, Victor Forni, murdered Officer Snow. The district court granted a writ of habeas corpus and released Mr. Landano on bail. The Third Circuit, however, reversed, on grounds of non-exhaustion and ordered the bail order vacated. *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), *rev'd*, 897 F.2d 661 (3d Cir.), *cert. denied* 111 S.Ct. 46 (1990).

Landano then filed a petition for post-conviction relief in the New Jersey Superior Court, Law Division, Hudson County. The trial judge, the Honorable Maurice A. Walsh, Jr., denied his bail, but, after a series of emergent applications, Mr. Landano obtained from the Supreme Court of New Jersey a stay of the arrest order pending proceedings before the trial level judge. New Jersey has no provision for bail pending collateral attacks upon criminal convictions.

On March 4, 1991, without holding an evidentiary hearing, Judge Walsh denied petitioner's application, ruling that all issues in his state petition had previously been presented to and adjudicated by the state courts in prior proceedings. The judge recommended to the Supreme Court of New Jersey that the stay of the arrest order be immediately dissolved.

Deeming the trial court's ruling to be tantamount to a finding that he had exhausted state remedies, on March 11, 1991, Mr. Landano returned to federal court by filing a petition for habeas corpus. Meanwhile, the State moved before the Supreme Court of New Jersey for dissolution of the stay of the arrest order.

In order to prevent the exercise of federal jurisdiction over the new habeas corpus petition, the State filed a motion before the state trial court asking that court to "clarify" its opinion by declaring that Mr. Landano had not in fact exhausted state remedies. The federal district court stayed any action on the new petition pending the state court's response to the State's motion.

On April 9, 1991, the state court issued a "clarified" opinion now purporting, without any hearing, to reach the merits of Mr. Landano's state petition and ruling against him on those merits.

On May 1, 1991, the state supreme court dissolved its stay of the arrest order.

On May 3, 1991, the federal district court granted bail to Mr. Landano until it could rule on a motion by the State to dismiss the underlying habeas petition for want

of jurisdiction. The district court later explained its reasons for granting bail in a Supplemental Opinion and Order of May 6, 1991. (See App., 36 to 44). The State appealed that bail order.

On February 4, 1992, the district court denied the State's motion to vacate bail and to dismiss the petition for want of jurisdiction. The Court granted bail to Mr. Landano pending exhaustion of state remedies. (See Opinion and Order at App., 45 to 66).

The State sought to obtain review of both the district court's jurisdictional ruling and its grant of bail by filing a petition for certification pursuant to 28 U.S.C. § 1292(b).

The circuit court treated the State's petition as a notice of appeal and consolidated that appeal with the State's appeal from the prior grant of bail.

On March 12, 1992, the New Jersey Appellate Division reversed the trial judge's denial of post-conviction relief and remanded for an evidentiary hearing.

On July 16, 1992, the Third Circuit issued its opinion and order revoking Mr. Landano's bail.

On July 17, 1992, following a hearing, the trial judge denied all relief.

A Petition for Rehearing was denied on August 11, 1992.

The Court granted a stay of the mandate on August 26, 1992 providing this Petition is filed on or before September 8, 1992.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THIS COURT'S RULINGS WITH REGARD TO PROBABLE INNOCENCE AND THE THIRD CIRCUIT'S RULING IN THIS CASE THAT PROBABLE INNOCENCE IS IRRELEVANT AS A MATTER OF LAW TO THE AVAILABILITY OF BAIL PENDING EXHAUSTION OF STATE REMEDIES.

It has long been established, as a matter of common law, that a United States district court has the power to grant bail *prior* to adjudication of the merits of a writ of habeas corpus. *See, e.g., Barth v. Clise,* 12 Wall 400, 402 (1871). *See, also, Aronson v. May,* 85 S.Ct. 3, 5 (1964) (chambers opinion); *Lucas v. Hadden,* 790 F.2d 365 (3d Cir. 1986); *United States v. Smith,* 835 F.2d 1048, 1050 (3d Cir. 1987); *Calley v. Calloway,* 496 F.2d 701, 702 (5th Cir. 1974); *Martin v. Solem,* 801 F.2d 324, 329 (8th Cir. 1986).

In *Lucas v. Hadden,* 790 F.2d 365 (3d Cir. 1986), the Third Circuit recognized that a district court has the power to grant bail pending a petitioner's exhaustion of state remedies, provided exceptional circumstances are present. The Circuit deemed a liklihood of success on the merits of the habeas petition *not* to amount to exceptional circumstances justifying bail. *Id.* at 367.

Here, Mr. Landano has gone beyond merely showing a liklihood of success on the merits, but rather has convinced

the district court of his probable innocence.[1] The Third Circuit, however, has deemed it an abuse of the district court's discretion for it to conclude that probable innocence is a factor to be weighed in determining whether or not to grant pre-judgment bail to a habeas petitioner. In so ruling, the Circuit has abandoned an entire body of this Court's law that has created exceptions to various procedural barriers to habeas relief where a petitioner can make a substantial showing of innocence.

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[1] As Judge Scirica writes, dissenting:

> Here, the district court based its finding of extraordinary circumstances in part on a finding of probable innocence.[1] Because I believe a finding of probable innocence should override usual considerations of comity even when there is a lack of exhaustion, I respectfully dissent.
>
> [1] On July 27, 1989, the district court found that there was a "distinct possibility that [Landano], indeed, may be innocent of the charges for which he was convicted," and that there was "a substantial probability . . . that the jury's verdict would have differed had [the suppressed evidence] been brought out at trial." *Landano v. Rafferty*, 126 F.R.D. 627, 649, 654 (D.N.J. 1989), *rev'd on other grounds*, 897 F.2d 661 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 46 (1990). On May 6, 1991, and February 4, 1992, the district court found that Landano "may be innocent of the charges for which he was convicted." *Landano v. Rafferty*, Nos. 85-4777, 89-2454, slip op. at 7 (D.N.J. May 6, 1991); *Landano v. Rafferty*, 782 F.Supp. 986, 993 (D.N.J. 1992). The district court is not alone in this view. A judge of this court has stated that "the State's case [against Landano], erected upon a house of cards, has little, if any, credible foundation to it." *Landano*, 897 F.2d at 685 (Rosenn, J. dissenting). The Landano majority stated that it "join[ed] with the district

(Continued on following page)

Indeed, very recently, this Court has expressed considerable interest in the role that probable innocence plays in habeas corpus jurisprudence. On February 19, 1992, this Court grant certiorari to consider whether at violates the Eighth and Fourteenth Amendments to execute an innocent person and further to consider the procedures that ought to be provided in state and federal court to determine innocence in death penalty cases. *See, Herrera v. Collins*, ___ U.S. ___, 112 S.Ct. 1074 (1992).

On June 22, 1992, this Court held in *Sawyer v. Whitley*, ___ U.S. ___, 112 S.Ct. 2514 (1992), that execution of a habeas petitioner is impermissible if he or she can, by clear and convincing evidence, demonstrate actual innocence of either the underlying offense or the degree of aggravating required for the death penalty.

In so ruling, this Court analogized a trio of 1986 decisions, *Kuhlman v. Wilson*, 477 U.S. 436 (1986), *Murray v. Carrier*, 477 U.S. 478 (1986) and *Smith v. Murray*, 47 U.S. 527 (1986) that allowed relaxation of various procedural barriers to federal habeas relief where the petitioner can "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of facts

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(Continued from previous page)

court in finding Landano's new allegations deeply troubling." *Id.* at 675 n.23, but held that Landano had failed to exhaust his state remedies.

would have entertained a reasonable doubt of his guilt." *Kuhlman, supra*, 477 U.S. at 455 n.17. *See also, McCleskey v. Zant*, 111 S. Ct. 1454, 1470 (1991).

Here, the Third Circuit has erroneously excised this Court's well-developed probable innocence exception from the body of law governing the issuance of federal bail prior to adjudication of a federal writ of habeas corpus. Distinguishing this Court's rulings in that regard, the Circuit reasoned as follows:

> The district court's reliance on Landano's possible innocence raises different considerations. In *McClesky v. Zant*, 111 S. Ct. 1454, 1470 (1991), the Court reiterated that a federal court may grant a writ of habeas corpus to a petitioner to avoid a "fundamental miscarriage of justice" when "a constitutional violation probably has caused the conviction of one innocent of the crime." *See also Murray v. Carrier*, 477 U.S. 478, 496 (1986) (courts in "extraordinary case" may excuse the petitioner from showing cause for procedural default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent"); *Smith v. Murray*, 477 U.S. 527, 537 (1986) (discussing doctrine in context of procedural default at sentencing phase); *Sawyer v. Whitley*, 60 U.S.L.W. 4655 (U.S. June 22, 1992) (same).
>
> We find two problems with the district court's reliance on Landano's probable innocence as a basis for bail. First, the "probable innocence" cases arise in the context of granting the writ, not granting bail. Second, and more important, that line of cases addresses the federal court's right to overlook a procedural default, not a failure to exhaust state remedies. When the State

> has not completed its review of the petitioner's claims, it is inappropriate for a federal court to reach the merits of petitioner's case in ruling on a motion for bail.
>
> The Supreme Court has emphasized that even in cases where a clear violation of the petitioner's rights was found, "considerations of federal-state comity would still inhere, and it would be unseemly in our dual system of government for the federal courts to upset a state-court conviction without affording the state courts the opportunity to correct a constitutional violation." *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981) (per curiam). *See also Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992) (as a matter of comity, exhaustion "should be strictly adhered to because it expresses respect for our dual judicial system" (quoting *Landano*, 897 F.2d at 668), *cert. denied*, 60 U.S.L.W. 3798 (U.S. May 26, 1992). As we noted in *Lucas*, "We doubt that it is appropriate to grant bail prior to ruling on a state habeas petition solely on the ground that there is a high likelihood of success on the merits. . . . " 790 F.2d at 367.

(App., 27 to 28)

The circuit court's reliance on principles of comity and federalism as a basis for striking probable innocence as a factor to be considered is not consonant with this Court's ruling that even the holding of *Wainwright v. Sykes*, 433 U.S. 72 (1977), born of considerations of comity and federalism, can and should be relaxed to reach the merits of a federal habeas petition by one who is probably innocent. *See, Murray v. Carrier*, 477 U.S. 478 (1986).

And the circuit court's reference to the doctrine of exhaustion of state remedies is of no support to its position. Here, the petitioner exhaustively petitioned the state courts for bail prior to seeking federal bail. The State, opposing those efforts, argued successfully that New Jersey has absolutely no mechanism for providing bail pending collateral attacks regardless of any showing of innocence.[2]

CONCLUSION

Because New Jersey has no bail provision, if federal bail is not provided, Mr. Landano will be almost certainly reimprisoned. In order to avoid that unjust result and to resolve the conflict between this Court's decisions and that of the court below, this Court should grant certiorari and reach the merits of this petition. In the alternative, this Court should grant certiorari, retain the case on its docket, and remand this matter for reconsideration following and in light of this Court's future decision in *Herrera, supra*.

Respectfully submitted,

SMITH, MULLIN & KIERNAN, P.C.

Attorneys for Petitioner
Vincent James Landano

By: NEIL MULLIN, ESQ.

DATED: September 8, 1992

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[2] As Judge Scirica points out in his dissent, because New Jersey has no power to grant Mr. Landano bail, considerations of comity do not bar a federal grant of bail. Comity requires deference to a court of equal, concurrent power, not a court without the power to grant a remedy. App., at 34.

Filed July 16, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5336

VINCENT JAMES LANDANO

v.

JOHN J. RAFFERTY,
Superintendent, Rahway State Prison;
IRWIN I. KIMMELMAN,
Attorney General of the State of New Jersey

State of New Jersey,
John J. Rafferty, Superintendent
East New Jersey State Prison,
Robert Del Tufo, Attorney
General of State of New Jersey,
Appellants

No. 91-5337

VINCENT JAMES LANDANO

v.

JOHN J. RAFFERTY,
Superintendent, East Jersey State Prison;
PETER PERRETTI,
Attorney General, State of New Jersey;
LESLIE FAY SCHWARTZ,
Deputy Attorney General;

THE OFFICE OF THE HUDSON
COUNTY PROSECUTOR;
KEARNY POLICE DEPARTMENT;
NEWARK POLICE DEPARTMENT;
JERSEY CITY POLICE DEPARTMENT; and
PERTH AMBOY POLICE DEPARTMENT

State of New Jersey,
John J. Rafferty, Superintendent
East New Jersey State Prison,
Robert Del Tufo, Attorney General
of State of New Jersey,
Appellants

On Appeal from the United States
District Court
For the District of New Jersey
(D.C. Civil Nos. 85-04777 and 89-02454)
Argued December 12, 1991

No. 92-5357

JOHN J. RAFFERTY, Superintendent,
East New Jersey State Prison, and
ROBERT DEL TUFO, Attorney General
of the State of New Jersey,

Appellants

v.

VINCENT JAMES LANDANO

On Appeal from the United States
District Court for the District of New Jersey

(D.C. Civil No. 91-1991)

Before: SLOVITER, *Chief Judge*,
SCIRICA and ROTH, *Circuit Judges*

(Opinion filed July 16, 1992)

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OPINION OF THE COURT

SLOVITER, *Chief Judge*.

This is the fourth time that this court has before it an aspect of the efforts by plaintiff-petitioner Vincent James Landano seeking a writ of habeas corpus awarding a new trial. Landano was convicted in 1977 in New Jersey state court on a charge of felony murder of a police officer

during the course of the robbery of a check-cashing establishment in New Jersey. In previous appeals to this court, we affirmed the district court's denial of a writ of habeas corpus, *Landano v. Rafferty*, 856 F.2d 569 (3d Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989); reversed the district court's subsequent grant of a conditional writ of habeas corpus because we concluded Landano had failed to exhaust state remedies, *Landano v. Rafferty*, 897 F.2d 661 (3d Cir.), *cert. denied*, 111 S.Ct. 46 (1990); and, most recently, in related litigation, affirmed in part and reversed in part the district court's order granting Landano's request for certain information under the Freedom of Information Act in which Landano seeks to uncover potentially exculpatory material. *See Landano v. Rafferty*, 956 f.2d 422 (3d Cir. 1992).[1]

The present appeals are by defendants John J. Rafferty, Superintendent of East New Jersey State Prison, and Robert Del Tufo, Attorney General of the State of New Jersey, (collectively referred to as "the State") from two orders granting bail to Landano. The first order granting bail to Landano pending review of his petition for habeas corpus was entered by the district court on May 3, 1991. We heard argument on these appeals on December 12, 1991.

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[1] We also note that in Landano v. Rafferty, 859 F.2d 201 (3d Cir. 1988)(Per Curiam), we dismissed for lack of jurisdiction Landano's appeal on behalf of counsel from the district court's refusal to appoint Landano's counsel retroactively and denying counsel's request for waiver of the maximum allowable fee pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (d)(3)(1982 & Supp. IV 1986).

On February 4, 1992, while the appeal was *sub judice*, the district court ruled on matters previously pending before it, and issued an order denying the State's motion to dismiss Landano's petition for failure to exhaust, staying the petition for habeas corpus pending exhaustion in the state courts, and, as most relevant here, continuing Landano's enlargement on federal bail pending exhaustion of state remedies. *Landano v. Rafferty*, 782 F. Supp. 986 (D.N.J. 1992). The State sought to appeal this order by filing a petition for permission to appeal. We hold that there was insufficient legal basis for the district court's bail orders, and reverse.

I.

FACTS

This case has a long and complicated procedural history which is set forth in detail in this court's prior opinions, as well as in district court opinions[2] which in turn relied on state court opinions. We will recount the facts only insofar as they are relevant to the issues before us.

On August 13, 1976, in the course of a robbery of the Hi-Way Check Cashing Service in Kearny, New Jersey, by two gunmen, one gunman killed Newark Police Officer John Snow. A Hudson County grand jury indicted Landano along with Allen Roller, Victor Forni, and Bruce

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[2] *See* Landano v. Rafferty, 670 F.Supp. 570 (D.N.J. 1987), *aff'd*, 856 F.2d 569 (3d Cir. 1988), *cert. denied*, 489 U.S. 1014 and Landano v. Rafferty, 126 F.R.D. 627 (D.N.J. 1989), *rev'd*, 897 F.2d 661 (3d Cir.), *cert. denied*, 111 S.Ct. 46 (1990).

Reen, for felony murder, armed robbery, and other offenses related to the incident. The day before the scheduled trial of Roller and Landano, Roller pled *non vuit* to the felony murder charge and entered into a plea agreement with the Hudson County Prosecutor to testify against Landano at trial. Roller's testimony was highly damaging to Landano.

Roller testified at trial that the robbery was masterminded by a motorcycle gang known as "The Breed" which frequently organized robberies in the area around Staten Island, New York, and that Landano, although not a Breed member or affiliate, was recruited specifically for the Kearny robbery at Forni's suggestion. Roller stated that when he and Landano arrived at the Hi-Way Check Cashing Service trailer early in the morning of August 13, 1976, Roller went to the window of the trailer and forced his way inside while Landano waited outside. Meanwhile, Officer Snow arrived in a patrol car at the Hi-Way parking lot carrying an attache case containing $46,000 in cash which was to be delivered to the check-cashing establishment. Roller testified that after he took the cash drawer of the check-cashing establishment at gunpoint, he say Landano running from a police car carrying an attach [sic] case. When he and Landano got in the car after the event, Landano stated that he had to "ice [or waste] the cop." *Landano*, 670 F. Supp. at 574.

Joseph Pascuitti, an employee of an adjacent warehouse, testified that he saw a dark-haired man approach Officer Snow's patrol car, that a moment later he heard gunshots, and that when he turned back, he saw a green Chevrolet pull away with the same dark-haired man driving. Pascuitti described the dark-haired man as having

curly hair; he was not able to identify Landano as that man.

The attempt of the perpetrators to maneuver away from the crime scene in snarled traffic caught the attention of Raymond Portas, a truck driver stopped at an intersection. He testified that Landano was driving the car, but he was unable to identify Roller. This was the bulk of the evidence presented at Landano's trial linking him to the murder of Officer Snow. *Id.* at 574-75.

In May 1977, Landano was found guilty on all counts and was sentenced to life imprisonment and a consecutive seven to fifteen year term for the other offenses.[3] In June 1977, Landano filed a notice of appeal. In October 1978, Landano obtained an order remanding the case to the trial court for consideration of a motion for a new trial on the basis of newly discovered evidence. Judge Maurice A. Walsh Jr., J.S.C., found, after a hearing that the knowledge of evidence of prior robberies carried out by Roller and Forni could be imputed to the prosecutor, that it had been suppressed, and that had it been revealed at trial it " 'would have been probative in demonstrating, if Roller denied Forni's participation [in those robberies], that Roller was protecting Forni.' " *Id.* at 585 (quoting Opinion of Judge Walsh, December 1, 1978, Appendix Vol. I. at 36A). Nevertheless, the court concluded that the evidence, although "exculpatory," was not "material" within the meaning of *Brady v. Maryland*, 373 U.S. 83

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[3] Subsequently, Forni and Reen were tried together and acquitted of all charged except conspiracy to commit armed robbery. State v. Landano, No. 73-76, slip op. at 2 (N. J. Super. Ct. March 4, 1991)(letter opinion).

(1963),[4] because the outcome of the trial would not have been different had it been revealed. The trial court thus denied the motion for a new trial. The Superior Court of New Jersey, Appellate Division, both affirmed that denial and denied Landano's direct appeal, and the New Jersey Supreme Court denied certification in July 1980.

Landano subsequently filed for post-conviction relief in state court in March 1982, based on, *inter alia*, a recantation by Raymond Portas, the truck driver who had positively identified Landano, and another *Brady* claim. The details of Portas's recantation and the reasons therefor are fully set forth by the district court in *Landano*, 670 F.Supp. at 574-84. Hearings on these claims were conducted in June, September, October, and November of 1982 before Judge Joseph P. Hanrahan, J.S.C. Portas testified that he had failed to identify Landano from a photo display on the day of the crime but nevertheless, on April 15, 1977, eight months later, he initiated the back of a photograph of Landano after the detective stated " '[t]hat's the man we want.' " *Id.* at 576. Portas claimed that he had picked out a different photograph (possibly of Victor Forni, *see id.* at 578-79 n.5) which the prosecutor handed to someone who took it out of the room. Portas also stated at the post-conviction hearing that when he was in the courthouse right before trial, a detective told him that Landano had passed them in the hallway and stated " 'that's our man.' " *Id.* at 577. Portas testified that he had not recognized Landano.

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[4] In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Court held that the suppression by the prosecutor of evidence material to the defendant's guilt is a violation of due process.

The state trial court denied the relief, finding Portas's recantation untrustworthy. *See id.* at 577-78. In January 1984 the Appellate Division denied Landano's appeal of that finding and in June 1984, the New Jersey Supreme Court denied certification.

Landano filed his first petition for habeas corpus in federal district court in New Jersey in October 1985, claiming a violation of his due process right to a fair trial based on Portas's recantation and the *Brady* claims he had raised in his motion for a new trial. The district court held an evidentiary hearing on September 2, 1987, and concluded that Portas "is a credible witness and further, that his recantation testimony is believable," *id.* at 579, and that the State's explanation of the missing photographs was "implausible." *Id.* at n.7. Nevertheless, because of the presumption of correctness for a state court's determination of factual issue under 28 U.S.C. § 2254(d)(1982), and the inapplicability of any of the exceptions to the presumption, the court deferred to the state court's determination that Portas was not a credible witness. The court also rejected Landano's claim that the State suppressed exculpatory and material evidence in violation of the requirements of *Brady*, and thus denied Landano's first petition for habeas corpus on the merits.[5] This court affirmed. *See Landano v. Rafferty*, 856 F.2d 569 (3d Cir. 1988).

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[5] The court also ruled on Landano's contention that the trial court issued a coercive *Allen* charge, *see Allen v. United States*, 164 U.S. 492 (1896), finding that, in context, the instruction was not so coercive as to deprive Landano of a fair trial and the right to a unanimous jury, *Landano*, 670 F.Supp. at 590.

In June 1989, Landano filed a motion under Fed. R. Civ. P. 60(b) to reopen the habeas proceeding because of fraud on the part of the prosecution concerning the suppression of evidence, and requested a temporary restraining order to obtain filed from the New Jersey Attorney General and the Hudson County Prosecutor. The court so ordered and Landano's counsel was permitted to review certain state documents.

Thereafter, Landano presented to the federal court allegedly exculpatory evidence of a handwritten document (the "ID on Landano") from the Kearny police files suggesting that Pascuitti and another potential witness, Christopher Calabrese, had rejected a photograph of Landano after stating that the suspect's hair was more curly, and a Kearny Police Department Continuation Report submitted by a Detective Rose which summarized a meeting with someone named either Joseph Pasapas or Basapas. Pasapas/Basapas apparently picked out a photograph of Victor Forni "as resembling the man who drove the car away."

After finding that Landano had exhausted his federal claims in state court, the district court reopened the habeas proceeding, invoking the "extraordinary circumstances" standard under Fed. R. Civ. P. 60(b)(6)[6] based on Landano's allegations that the State suppressed exculpatory evidence. *Landano v. Rafferty*, 126 F.R.D. 627, 638 (D.N.J. 1989). The court found that there was a violation of *Brady v. Maryland* because the evidence presented had

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[6] 6. Fed. R. Civ. P. 60(b) provides: "the court may relieve a party . . . from a final judgment . . . for . . . (6) any other reason justifying relief from the operation of the judgment."

been suppressed, was exculpatory, and was material because if the defense had known about it, it would have bolstered Landano's affirmative defense that Forni was the actual killer of Officer Snow. *Id.* at 644-54. Accordingly, the court granted a conditional writ of habeas corpus unless the state commenced a new trial within ninety days, and ordered Landano released on bail on July 28, 1989. *Id.* at 654.

The State appealed the conditional grant of the writ. In February, 1990, this court reversed the district court on the ground that Landano had not exhausted some of the claims on which the district court based its decision. *Landano*, 897 F.2d 661 (3d Cir.). *cert. denied*, 111 S. Ct. 46 (1990). We held that Landano must provide the state courts with the factual predicate for his legal theory as to why his constitutional rights have been violated so that the court could determine the materiality of the material suppressed. We stated that in making that determination, a court "must conduct a fact-sensitive examination of the precise nature of the suppressed information" so that it can make the "delicate judgment as to whether there is a reasonable probability that had the suppressed evidence been disclosed, the outcome of the trial would have been different." *Id.* at 670. Thereafter, the district court dismissed Landano's habeas petition.

Landano returned to state court and filed a petition for habeas corpus/post-conviction relief and bail. The bail was denied by Judge Walsh and that denial was affirmed on appeal. On November 15, 1990, however, the New Jersey Supreme Court, without an opinion, granted Landano, who was still at liberty at the time following the district court's earlier order granting Landano's writ of

habeas corpus, a stay of the arrest order pending a decision on his post-conviction relief petition. The status of this stay of arrest as bail *vel non* is an issue which the parties address but which we need not decide.

On March 4, 1991, Judge Walsh denied Landano's petition under New Jersey Rule of Criminal Procedure 3:22-1 for post-conviction relief, referring, *inter alia*, to the concession of Landano's counsel that everything he was asserting in this petition had already been previously presented to the state courts. Inasmuch as Rules 3:22-4 and 3:22-5 bar relief in post-conviction proceedings on grounds that either were not raised in prior proceedings (with exceptions) or for issues already adjudicated, Judge Walsh ruled that "it is evident that petitioner continues to raise issues and arguments which have long since been ruled on and supposedly disposed of under our New Jersey Court Rules." *State v. Landano*, No. 73-76, slip op. at 23 (N.J. Super. Ct. March 4, 1991) (letter opinion). Judge Walsh also ordered the parties to appear before the New Jersey Supreme Court on or before March 13, 1991, for a determination of whether Landano should continue on bail.[7]

The State immediately filed a motion in the New Jersey Supreme Court to lift the stay of arrest, apparently submitting with that motion a sworn statement, dated February, 15, 1991, that there had been "a full hearing on the merits of defendant's Post-Conviction Relief Application . . . before the honorable Maurice A. Walsh, Jr." *See*

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[7] Although Judge Walsh referred to it as bail, Landano's freedom at that point was actually due to the New Jersey Supreme Court's stay of arrest order.

Transcript of Proceedings, Civil Nos. 85-4777 and 89-2454 at 6 (D.N.J. March 12, 1991).

Landano, rather than appeal this ruling,[8] filed a successive petition for habeas corpus on March 11, 1991, arguing that Judge Walsh's opinion and the State's statement to the New Jersey Supreme Court demonstrated that he had exhausted his claims. Hours before the scheduled hearing before the federal court on March 12, 1991, the State asked Judge Walsh for a rehearing.

At the March 12 hearing before the federal court, Landano, fearful that the New Jersey Supreme Court would act on the State's latest request and lift the stay of arrest, sought federal bail.[9] He argued that because there is no New Jersey statutory provision for allowing bail

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[8] Landano argued that he had nothing from which to appeal in state court because he was not aggrieved by Judge Walsh's decision. As Landano's counsel stated, "I can hardly get up in front of the Appellate Division and lie and say, 'I don't think the issues were 'exhaustively tried.' ' " Transcript, March 12 at 3.

[9] Landano's counsel also complained about the State's inconsistent positions.

> They [the State] represented to the State Supreme Court that we had a full and fair hearing, but after learning we were coming here [to federal court], they swear in another affidavit that we will in the interest of justice require a hearing. That is playing fast and loose, so the State is estopped from claiming they didn't have a hearing.

Transcript, March 12 at 7.

pending post-conviction proceedings, there was "an absence of an available State corrective process or existence of circumstances rendering such process [ineffective] to protect the rights of the prisoner" under 28 U.S.C. 2254(b). Transcript, March 12 at 5-6.[10]

At the close of this hearing, the federal court denied the order to show cause why the writ should not be granted, but got the parties to agree that "no application will be made to arrest Mr. Landano until this Court has the opportunity to rule upon the pending application." Transcript, March 12 at 28. A consent order to that effect was entered on April 12, 1991.

On March 22, 1991, Judge Walsh conducted a hearing on the State's petition for rehearing from the March 4th order. On April 9, 1991, he issued a letter opinion, which he characterized as an "addendum" to his March 4th opinion, denying the State's motion for a full rehearing because the first hearing was "full" enough. Thus, the denial of post-conviction relief would stand. At the same time, the judge clarified his previous opinion by saying that the denial of relief as to three issues was based on their prior adjudication and

> the remaining issues consisting of the 'Basapas/ Pasapas report,' 'I.D. on Landano' document, additional evidence suppressed by the State,

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[10] The State's position at this hearing was that the court did not have jurisdiction because there were still ongoing state court proceedings, based on its application for a rehearing.

> and destroyed evidence are all based on conjecture, failing to impress this court enough to grant an evidentiary hearing.

Re: Vincent James Landano, No. 73-76, slip op. at 11-12 (N.J. Super. Ct., April 9, 1991) (letter opinion). The court again ordered the parties to appear before the New Jersey Supreme Court on the question of rescission of bail no later than April 11, 1991. Subsequently, on May 1, 1991, the New Jersey Supreme Court entered an order without explanation granting the State's motion to vacate the stay of arrest, effective May 2, 1991, at 5 p.m.

Landano returned immediately to federal court and filed a motion for bail and an order to show cause why a writ of habeas corpus should not be granted. The district court held a conference call and then an emergency hearing on the morning of May 2, 1991, expressing its displeasure at the prosecutor's failure to take action to prevent Landano's arrest.[11] The court orally ordered that Landano

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[11] In fact, the district court used what it believed was the State's obstreperousness as a basis for the subsequent bail order:

> Since the State will not consent, despite its earlier agreement to do so, and has expressed its intent to violate the order of this Court to which it consented, the Court *must fashion its own remedy* to grant the parties and the Court the time needed to prepare and consider the issues raised.

Transcript of Proceedings, Civil Nos. 85-4777 and 89-2454, at 30 (D.N.J. May 2, 1991) (emphasis added).

be released on bail in the custody of his attorney and under the supervision of the United States Pretrial Services.

This order, entered May 3, 1991, was subsequently explicated in the court's Order and Opinion dated May 6, 1991. At that time the court explained that it had granted bail pending habeas review of a state conviction under the authority of *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986), a case in which this court held that bail to a state prisoner pending federal habeas review was available in "extraordinary circumstances." The district court found that such extraordinary circumstances existed here to warrant bail.[12]

The argument before this court focused primarily on the authority of the district court to grant bail before it had determined whether the petitioner had exhausted his state remedies on the effect of the suppression of the newly discovered material relating to the "ID on Landano" and the "Pasapas/Basapas" documents.

On February 4, 1992, while the matter was pending here, the district court ruled on the still pending motion filed by the State to dismiss Landano's habeas petition for failure to exhaust state remedies as to the newly discovered material. The court found that Landano had failed to exhaust his remedies with regard to that issue, but it denied the State's motion to dismiss Landano's petition for a writ of habeas corpus, instead staying the habeas

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[12] The State's efforts to get a stay of the bail order on motion to this court was unsuccessful, and the matter was referred to a merits panel.

proceeding pending Landano's exhaustion of state remedies. In addition, the court ordered that Landano be continued on federal bail pursuant to its order entered May 3, 1991. Shortly thereafter, on February 14, 1992, the State filed a motion for permission to appeal from the order continuing Landano on federal bail, and this court docketed that petition as no. 92-8013.[13]

While the federal matter was proceeding as set forth, on March 12, 1992, the New Jersey Appellate Division acted on Landano's appeal from Judge Walsh's order denying an evidentiary hearing on new evidence (the "ID on Landano" and the "Basapas/Pasapas Report"). After reviewing the procedural sequence in the state and federal courts, the Appellate Division stated, "We believe that the record reflects the need for an evidentiary hearing relating to the prosecutor's conduct and its impact on the verdict." *State v. Landano*, A-4458-90TI, slip op. at 22 (N.J. Super. Ct. App. Div. March 12, 1992) (per curiam). The court continued, "If found to have merit, the 'newly discovered facts' resulting in new issues not raised . . . in prior state court proceedings may well impact on the previously considered issues." *Id.* The court stated that these were "extraordinary circumstances" which require that the procedural rules barring consideration of issues not previously raised and reconsideration of previously raised issues "must give way to fundamental fairness in this post-conviction proceeding." *Id.*

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[13] The State also sought reversal of the district court's denial of its motion to dismiss Landano's petition for habeas corpus.

The court directed Judge Walsh to hold an evidentiary hearing to consider the claims stemming from documentation that two people, including a witness at trial, failed to identify a photograph of Landano; the police department continuation report that a witness or witnesses identified Forni as the driver of the getaway car; and the failure to submit this information to Landano at or before his trial. The court also directed Judge Walsh to consider other claims including the impact of any lost or destroyed material.

We have been advised by counsel that pursuant to this direction, Judge Walsh has held an evidentiary hearing. To date no decision has been forthcoming. Under these circumstances, and because Landano remains at liberty on federal bail, we proceed to dispose of the State's appeal of the federal bail orders.

II.

Jurisdiction

The procedural sequence set forth gave rise to a series of motions in this court which we dispose of initially. Following the State's Petition for Permission to File an Appeal from the district court's order continuing Landano on bail, Landano filed a motion to dismiss that petition on the ground that the state had failed to comply with 28 U.S.C. § 1292(b) which requires that, prior to seeking permission for certification of an interlocutory appeal, applicant must first seek certification from the district court.

Landano is indeed correct that an appeal from an interlocutory decision cannot be taken to a Court of Appeals pursuant to 28 U.S.C. § 1292(b) unless the district court states in writing that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Thus, were the order continuing Landano on bail an interlocutory order not otherwise appealable to this court, we would be required to deny the requested permission because of the absence of district court certification. However, that is not necessary in this case because rather than being an unappealable interlocutory order, the court's order granting bail pending disposition of a habeas petition is plainly appealable as a collateral order. *See United States v. Smith*, 835 F.2d 1048, 1050 (3d Cir. 1987). Thus, the appeal of the most recent bail order of February 4, 1992, and the prior appeals of the first bail order by the district court are before us in the same procedural posture, *viz.*, as orders for bail pending review of a petition for habeas corpus.[14] Therefore, as long as there was a timely notice of appeal, no permission by this court was needed.

The Petition for Permission to Appeal itself may be treated as a Notice of Appeal. In *Smith v. Barry*, 112 S. Ct. 678 (1992), the Supreme Court interpreted Rule 3 of the

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[14] The district court's denial of the State's motion to dismiss the successive habeas petition, on the other hand, is an interlocutory order, *see* United States v. Liotard, 817 F.2d 1074, 1077 n.4 (3d Cir. 1987), and, barring proper certification by the district court pursuant to 28 U.S.C. § 1292(b), we do not have jurisdiction to review it.

Federal Rules of Appellate Procedure to permit a brief which was the "functional equivalent" of a notice of appeal to substitute for a notice of appeal as long as "the filing provides sufficient notice to other parties and the courts." *Id.* at 682.[15] The State's Petition for Permission to Appeal contained all of the elements required by Fed. R. App. P. 3(c)[16] and was timely filed. Therefore, we may treat it as a notice of appeal of Judge Sarokin's Order of February 4, 1992, continuing Landano on federal bail.[17]

Also pending before us is a motion filed by Landano to dismiss appeal nos. 91-5336 and 91-5337 as moot, on the ground that the original order granting bail has since been superceded by the district court's order of February 4, 1992. We note that in the latter order the district court stated that it was *continuing* Landano on bail pursuant to the same terms and conditions of the previous bail order. Under these circumstances, we believe it is more expeditious to consolidate the appeals from the two orders

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[15] The filing of the motion for permission to appeal in the appellate court rather than the district court, as required by Fed. R. App. P. 3(a) is also not fatal to its effectiveness as a notice of appeal. *See* Fed. R. App. P. 4(a)(1); *Smith*, 112 S. Ct. at 682.

[16] Fed. R. App. P. 3(c) states in relevant part:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

[17] We entered an order directing that the Clerk treat the petition for permission to appeal as a notice of appeal, and filed *nunc pro tunc*. This appeal has been docketed as no. 92-5357 and consolidated with appeal nos. 91-5336 and 91-5337.

rather than to dismiss appeal nos. 91-5336 and 91-5337 as moot.

We therefore turn to the merits. The grant of bail is discretionary with the district judge; this court's review is under the abuse of discretion standard.

III.

DISCUSSION

The issue presented is whether the requisite "extraordinary circumstances" exist for a grant of bail pending review by the federal court of Landano's habeas petition. Because the more recent appeal presents the case in its most up-to-date posture, we will reach it first and, in so doing, dispose of all appeals currently before us.

At the outset, it is necessary to distinguish between bail pending the district court's review of a petition for habeas relief and bail pending review by an appellate court of an order of the district court granting a writ of habeas corpus. The latter case is governed by Rule 23(c) of the Federal Rules of Appellate Procedure.[18] In *Hilton v.*

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[18] Rule 23(c) provides:

> Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

Braunskill, 481 U.S. 770 (1987), the Supreme Court held that when a writ has issued, the court has discretion to release the prisoner using "the traditional standards governing stays of civil judgments," *id.* at 774, such as likelihood of success on the merits, irreparable injury, injury to other parties, and the public interest. *Id.* at 776.

On the other hand, when bail is sought by a prisoner who has been convicted in either state or federal court and the district court has denied the collateral relief sought, the standard for bail is, of course, more stringent. As Justice Douglas stated in denying an application for bail pending review by the court of appeals of the district court's denial of a petition for a writ of habeas corpus:

> This applicant is incarcerated because he has been tried, convicted, and sentenced by a court of law. . . . It is obvious that a greater showing of special reasons for admission to bail pending review should be required . . . than . . . in a case where applicant sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt.

Aronson v. May, 85 S. Ct. 3, 5 (1964) (chambers opinion); *see also* Fed. R. App. P. 23(b).

A third category of bail cases arises when the district court has pending, but has not yet decided, a petition for habeas corpus. In *United States v. Smith*, 835 F.2d 1048, 1050 (3d Cir. 1987), which presented such a situation, we applied the standards set forth in *Hilton*.[19] In *Calley v.*

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[19] Arguably, this standard was more liberal toward release from custody than warranted, inasmuch as *Hilton*, unlike

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Callaway, 496 F.2d 701, 702 (5th Cir. 1974), where the bail issue was presented in a similar posture, the court held that bail pending post-conviction habeas corpus review was available "only when the petitioner has raised substantial constitutional claims upon which he has a high probability of success, and also when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective." *See also Martin v. Solem*, 801 F.2d 324, 329 (8th Cir. 1986) (applying same standard).

Although *Smith* and *Calley* both concerned bail to a federal prisoner while a petition for habeas corpus was pending, there is precedent, including a direction by the Supreme Court, that affirms the authority of a federal court to grant bail to a state prisoner prior to ruling on the prisoner's petition for habeas corpus. *See In Re Shuttleworth*, 369 U.S. 35 (1962) (per curiam) (directing that after petitioner seeks bail from state court, district court should "proceed to hear and determine the cause, including any application for bail pending that court's final disposition of the matter"); *see also In re Wainwright*, 518 F.2d 173, 174 (5th Cir. 1975) (per curiam) ("In spite of the lack of specific statutory authorization, it is within the inherent power of a District Court of the United States to

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Smith, involved a prisoner who had been granted habeas. Because Smith confined himself on appeal exclusively to the showing of likelihood of success on the merits on the ground that a recent Supreme Court decision undermined all counts of his conviction, *see* 835 F.2d at 1050, there was no occasion to consider the exceptional circumstances issue.

enlarge a state prisoner on bond pending hearing and decision on his application for a writ of habeas corpus").

Our Court addressed the considerations to be taken into account in deciding whether to grant bail pending review of the habeas petition of a state prisoner in *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986). We stated that the factual predicate for the exercise of such power was a finding of "extraordinary circumstances." This "standard reflects the recognition that a preliminary grant of bail is an exceptional form of relief in a habeas corpus proceeding." *Id.* at 367.

Very few cases have presented extraordinary circumstances, and those that have seem to be limited to situations involving poor health or the impending completion of the prisoner's sentence. In *Johnston v. Marsh*, 227 F.2d 528 (3rd Cir. 1955), where we held that the district court considering a petition for habeas corpus by a state prisoner had inherent power to admit the prisoner to bail, we found that bail was warranted because the prisoner was "an advanced diabetic [who] was, under conditions of confinement, rapidly progressing toward total blindness." *Id.* at 529. Notably, the decision did not place the prisoner at liberty but instead released him to a hospital for immediate treatment.

Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1968), illustrates the situation where bail has been awarded because the sentence was so short that if bail were denied and the habeas petition were eventually granted, the defendant would already have served the sentence. In that case, the Fifth Circuit directed the district court to release Boyer, who had been sentenced to 120 days in

prison, on bail while he exhausted in the Florida courts his constitutional claim that because he was indigent, he was entitled to court-appointed counsel in the misdemeanor case. Notably, the Fifth Circuit had recently decided in other cases that there was such a constitutional right. The court stated that it was obliged to take extraordinary action to make Boyer's exhaustion in the Florida courts truly effective, or his sentence would long have been served.

In light of the general principles reflected by the aforesaid authorities, we turn to examine the reasons given by the district court in this case in holding that Landano, a state prisoner, should be granted bail while he pursued his exhaustion of state remedies.

First, the district judge stated that it had " 'already determined that petitioner may be innocent of the charges for which he was convicted.' " *Landano v. Rafferty*, 782 F. Supp. 986, 992 (D.N.J. 1992) (quoting *Landano v. Rafferty*, No. 91-1881, slip op. at 7 (D.N.J. May 6, 1991) (supplemental opinion and order)). The judge referred to his earlier discussion of the nature of the alleged exculpatory evidence which Landano had claimed was suppressed by the State during the trial, appearing in *Landano*, 126 F.R.D. at 644-45.

Second, the district judge stated that New Jersey has no provision for bail pending a petition for post-conviction relief, thereby making it impossible that Landano could get his desired relief, i.e., bail, through state proceedings. *Landano*, 782 F. Supp. at 993. The court stated next that the State has admitted that Landano posed no

risk of flight, *id.*, and in fact "has demonstrated a commitment to 'clearing his name' " In addition, in its earlier opinion of May 6, 1991, the district court found "that the state has acted at a level of bad faith sufficient to require this extraordinary form of relief." *Landano*, No. 91-1881, slip op. at 8. In particular the court referred to the attempt by the State's officers to arrest Landano as soon as the New Jersey Supreme Court lifted its stay of arrest, even though the prosecutor had previously consented to the district court's order not to arrest Landano pending the court's action on Landano's habeas petition.

Finally, the court stated that the State had engaged in "prosecutorial maneuvering" that "could, if encouraged have the effect of contributing to inordinate delays in the processing of [Landano's] claims for relief." *Landano*, 782 F. Supp. at 994.

We find the district court's analysis problematic. Taking the last reason first, it is far from clear that the prosecution can be faulted for creating any inordinate delays. The district court never previously made such a charge in any of its opinions. It is true that the state courts took a different view of the facts and applicable law than that held by the district court and thus the final disposition of this matter may seem overly extended to the district court, but we cannot see how this result, endemic to exhaustion of state remedies, would justify bail. No case, including *Glynn v. Donnelly*, 470 F.2d 95 (1st Cir. 1972), relied on by the district court, holds that the delay resulting from exhaustion of state remedies is a special circumstance warranting federal bail. In any event, this reason given by the district court is disposed

of by Landano's brief on appeal which expressly disclaims delay as an "extraordinary circumstance."

We also believe that the absence of bail in New Jersey is not an extraordinary circumstance warranting federal bail. The parties agree that New Jersey does not provide for bail pending review of post-conviction motions of convicted felons. *See State v. Rose*, 210 A.2d 793, 794 (N.J. Super. Ct. Law Div. 1965).[20] Nevertheless, there is no federal constitutional right to bail pending appeal of a state conviction, *see Finetti v. Harris*, 609 F.2d 594, 597 (2d Cir. 1979); *Marks v. Zelinski*, 604 F.Supp. 1211, 1213 (D.N.J. 1985) (citing *Finetti*), and therefore it would be anomalous to regard its absence as an extraordinary circumstance. Furthermore, the New Jersey Supreme Court's action in staying the arrest of Landano after this court reversed the district court's grant of the writ was a procedure analogous to bail and served the same purpose. In fact, it was only after this stay was vacated on May 2, 1991, that the district court felt it necessary to grant bail.

The district court's reliance on Landano's possible innocence raises different considerations. In *McClesky v. Zant*, 111 S. Ct. 1454, 1470 (1991), the Court reiterated that a federal court may grant a writ of habeas corpus to a petitioner to avoid a "fundamental miscarriage of justice" when "a constitutional violation probably has caused the conviction of one innocent of the crime." *See also Murray v. Carrier*, 477 U.S. 478, 496 (1986) courts in "extraordinary case" may excuse the petitioner from showing cause for

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[20] Absent a decision to that effect by the New Jersey Supreme Court, we take no position as to whether the absence of an explicit provision for bail means that bail is unavailable.

procedural default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent"); *Smith v. Murray*, 477 U.S. 527, 537 (1986) (discussing doctrine in context of procedural default at sentencing phase); *Sawyer v. Whittley*, 60 U.S.L.W. 4655 (U.S. June 22, 1992) (same).

We find two problems with the district court's reliance on Landano's probable innocence as a basis for bail. First, the "probable innocence" cases arise in the context of granting the writ, not granting bail. Second, and more important, that line of cases addresses the federal court's right to overlook a procedural default, not a failure to exhaust state remedies. When the State has not completed its review of the petitioner's claims, it is inappropriate for a federal court to reach the merits of petitioner's case in ruling on a motion for bail.

The Supreme Court has emphasized that even in cases where a clear violation of the petitioner's rights was found, "considerations of federal-state comity would still inhere, and it would be unseemly in our dual system of government for the federal courts to upset a state-court conviction without affording the state courts the opportunity to correct a constitutional violation." *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981) (per curiam). *See also Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992) (as a matter of comity, exhaustion " 'should be strictly adhered to because it expresses respect for our dual judicial system' " (quoting *Landano*, 897 F.2d at 668)), *cert. denied*, 60 U.S.L.W. 3798 (U.S. May 26, 1992). As we noted in *Lucas*, "We doubt that it is appropriate to grant bail prior to ruling on a state habeas petition solely on the ground that there is a high likelihood of success on the merits. . . . " 790 F.2d at 367.

As to the district court's impatience with the State's unwillingness to permit Landano to remain at liberty, we know of no principle that would require a state prosecutor to agree to order the Department of Corrections not to arrest a defendant when there is no legal impediment to such rearrest. In light of the above, the district court's reliance on the small risk of Landano's flight would also not seem to rise to an extraordinary circumstance.

Although the district court purported to rely on *Lucas* as the principal authority warranting its decision that Landano had shown extraordinary circumstances, we believe that an analysis of *Lucas* leads to the opposite conclusion. In *Lucas*, this court held unanimously that the district court had improperly admitted the state prisoner to bail, inasmuch as the prisoner had failed to exhaust state remedies. In this case, the opinion of the Appellate Division of the New Jersey Supreme Court directing the state trial court to hold an evidentiary hearing demonstrates the Appellate Division's understanding and appreciation of the relevance of the newly found material that was suppressed. Under these circumstances, there is no reason for a federal court to intrude by directing that Landano be released on bail. Such a decision can be made, either as on bail or as a stay of arrest, by the New Jersey courts if they deem it appropriate.

Although the district court's decision on bail is one that should be accorded discretion, we are satisfied that the district court gave inadequate weight to the important comity considerations that apply when a state court is reviewing the substance of the claim that its proceedings deprived the prisoner of a constitutional right. We

thus conclude that Landano has not made the necessary showing of exceptional circumstances warranting bail.

IV.

Conclusion

For the reasons set forth, we will reverse the district court's orders granting bail and remand with directions that the district court turn the custody of Landano over to the appropriate state officials. Each party to bear its own costs.

SCIRICA, *Circuit Judge*, dissenting.

In this circuit, a habeas corpus petitioner may be granted bail pending disposition of his petition where "extraordinary circumstances" are present. *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986). Here, the district court based its finding of extraordinary circumstances in part on a finding of probable innocence.[1] Because I

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[1] On July 27, 1989, the district court found that there was a "distinct possibility that [Landano], indeed, may be innocent of the charges for which he was convicted," and that there was "a substantial probability . . . that the jury's verdict would have differed had [the suppressed evidence] been brought out at trial." *Landano v. Rafferty*, 126 F.R.D. 627, 649, 654 (D.N.J. 1989), *rev'd on other grounds*, 897 F.2d 661 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 46 (1990). On May 6, 1991, and February 4, 1992, the district court found that Landano "may be innocent of the charges for which he was convicted." *Landano v. Rafferty*, Nos. 85-4777, 89-2454, slip op. at 7 (D.N.J. May 6, 1991); *Landano v. Rafferty*, 762 F. Supp. 986, 993 (D.N.J. 1992). The district court is not alone in this view. A judge of this court has stated that "the

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believe a finding of probable innocence should override usual considerations of comity even when there is a lack of exhaustion, I respectfully dissent.

The majority "believe[s] that an analysis of *Lucas* leads" to the conclusion that no extraordinary circumstances justifying the district court's grant of bail are present here. Majority typescript at 29. I cannot agree. Landano, unlike Lucas, raises federal constitutional claims in his habeas petition. More importantly, the district court found, based on newly discovered evidence, that Landano "may be innocent of the charges for which he was convicted" and has "a likelihood approaching certainty of success on the merits." *Landano v. Rafferty*, 762 F. Supp. 986, 993 (D.N.J. 1992).

Lucas involved a petitioner who alleged that upon his release on parole from federal prison, he was wrongly recommitted to state prison to serve a term that had run concurrently with his federal term. He "asserted no constitutional violation nor did he identify any violation of federal law that was alleged to be the cause of his confinement." *Lucas*, 790 F.2d at 366. Furthermore, Lucas, who had pleaded guilty to federal narcotics violations, made no showing of probable innocence. In that context, we stated: "We doubt that it is appropriate to grant bail

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(Continued from previous page)

State's case (against Landano), erected upon a house of cards, has little, if any, credible foundation to it." *Landano*, 897 F.2d 685 (Roseon, J. dissenting). The *Landano* majority stated that it "join[ed] with the district court in finding Landano's new allegations deeply troubling," *id.* at 675 n.23, but held that Landano had failed to exhaust his state remedies.

prior to ruling on a state habeas petition solely on the ground that there is a high likelihood of success on the merits, especially absent exhaustion of state remedies." *Id.* at 367.

The circumstances here are fundamentally different from those in *Lucas*. Landano alleges that his conviction was unconstitutionally obtained through coerced testimony and the State's suppression of exculpatory evidence, and has convinced the district court of his probable innocence.

The Supreme Court has recognized a crucial distinction in its habeas corpus jurisprudence between a likelihood of success on the merits and a probability that a constitutional violation has resulted in the conviction of an innocent person. Generally, petitioners are denied federal habeas relief in cases of procedural default,[2] abuse of the writ,[3] or failure to develop a claim in state-court proceedings.[4] unless they can show cause and prejudice. However, these failings are excused in those "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." *McCleskey v. Zant*, 111 S. Ct. 1454, 1470 (1991). The Supreme Court's "probable innocence" or "miscarriage of justice" exception applies where a petitioner " 'establishe[s] that under the probative evidence he has a colorable claim of factual innocence,' " *i.e.*, where there is " 'a fair probability that, in light of all the evidence, including any

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[2] *Murray v. Carrier*, 477 U.S. 478 (1986).

[3] *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Wise v. Fulcomer*, 958 F.2d 30 (3d Cir. 1992).

[4] *Keeney v. Tamayo Reyes*, 112 S. Ct. 1715 (1992).

alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.' " *Sawyer v. Whittley*, 60 U.S.L.W. 4655, 4657 (U.S. June 22, 1992) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454-55 (1986); other citation omitted). Because the district court here found "a substantial probability . . . that the jury's verdict would have differed had [the suppressed evidence] been brought out at trial," and that Landano "may be innocent of the charges for which he was convicted," *see supra* note 1, the probable innocence exception should apply.

The majority distinguishes the Supreme Court's probable innocence cases on the ground that those cases address "the federal court's right to overlook a procedural default, not a failure to exhaust state remedies." Majority typescript at 28. I believe this distinction is immaterial.

The probable innocence exception to the cause and prejudice requirement embodies the Court's belief that "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). Yet, the majority says that "[w]hen the State has not completed its review of the petitioner's claims, it is inappropriate for a federal court to reach the merits of petitioner's case in ruling on a motion for bail." Majority typescript at 28. I can discern no reason why comity will not prevent correction of a

fundamental miscarriage of justice in the context of procedural default, abuse of the writ, or failure to develop a claim, but will preclude relief absent exhaustion.

Moreover, the relief granted by the district court here poses little threat to comity. The doctrine of comity " 'teaches that one court should defer action on causes properly within its jurisdiction until courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' " *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)). The parties agree, and the district court found, that New Jersey does not provide for bail in cases like this one. *See Landano*, 782 F. Supp. at 995. Therefore, as the district court noted, there is no "affront to the state courts in this court retaining jurisdiction solely in order to extend bail, since New Jersey courts could not 'pass upon the matter' in any case." *Id.* Furthermore, because the district court held that Landano had not exhausted his state remedies, and therefore did not grant Landano's petition for writ of habeas corpus, the New Jersey courts will be afforded the first opportunity to correct their own constitutional errors, if any, as comity requires. In any event, *Lucas* states that comity must give way under "extraordinary circumstances."

Although "a preliminary grant of bail is an exceptional form of relief in a habeas corpus proceeding," *Lucas*, 790 F.2d at 367, our standard of review is abuse of discretion. I believe the district court did not abuse its discretion in holding that the factors it cited, especially

Landano's probable innocence, justified the grant of bail pending exhaustion of state remedies.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner, v. JOHN J. RAFFERTY, Superintendent East New Jersey State Prison, and ROBERT DEL TUFO, Attorney General of the State of New Jersey, Respondents.	Civil Action Nos.[1] 91-1881(HLS) 85-4777 89-2454 SUPPLEMENTAL OPINION AND ORDER (ORIGINAL Filed May 6, 1991)

Sarokin, District Judge

Before the court is petitioner's motion for bail pursuant to 28 U.S.C. § 2254(b) and for an order to show cause why his petition for a writ of habeas corpus should not be granted. The court heard argument on this matter at 10 a.m. on Thursday, May 2, 1991 and issued an order granting petitioner's motion for bail but denying the order to show cause at approximately 12 noon that same day. At that time, the court issued a brief opinion from the bench which explained the basis for the court's rulings. The court hereby supplements its opinion in light of

[1] The court has utilized the above docket numbers but finds that a new docket number should have been assigned the petition filed on March 11, 1991.

the expedient nature in which these matters were handled and the complexity and importance of the issues at stake.

Background

Prior to this pending habeas petition, petitioner had filed two previous habeas petitions, docketed as Civ. No. 85-4777 and Civ. No. 89-2425, in 1985 and 1989, respectively. The 1985 petition was denied. This court granted the 1989 petition on July 27, 1989, and petitioner has been at large since that date. However, the issuance of the writ was reversed by the Third Circuit Court of Appeals based on petitioner's failure to exhaust his state remedies. *Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1991). In accord with the Third Circuit's mandate, this court dismissed the 1989 petition on October 30, 1991, and vacated all orders which had been entered.

Since that date, petitioner returned to the Superior Court of New Jersey, Judge Walsh presiding, and filed a petition for post-conviction relief in accordance with the Third Circuit's mandate. By his Opinion dated March 4, 1991, Judge Walsh denied petitioner's request for post-conviction relief without an evidentiary hearing, reasoning that all of petitioner's claims "had been exhaustively litigated" and were barred under N.J. Rule 3:22-5, which prohibits re-litigation of issues previously decided.

On March 11, 1991, petitioner notified chambers that he intended to file an order to show cause why his petition for a writ of habeas corpus should not be granted. The court scheduled the emergency hearing for March 12th. The court instructed petitioner to file papers

by the close of business on March 11th. Petitioner did so, but his papers were filed through the night box at 4:05 p.m., since the Clerk's Office closes at 4 p.m. Petitioner's papers consisted of a one-page Verified Successive Petition for a Writ of Habeas Corpus, which states: "the petitioner hereby incorporates and repeats as if fully set forth herein all claims set forth in his prior petition for habeas corpus as supplemented by this court's opinions and orders under docket numbers 85-4777 and 89-2454." Thus, the merits of petitioner's Successive Petition are identical to those of the 1989 petition. What was different, however, was the procedural posture of the petition vis-a-vis exhaustion in light of Judge Walsh's 1991 ruling.[2] These factors were explained in the order to show cause papers – not in the habeas petition. Petitioner filed his papers in the night box, and the Successive Verified Petition was stamped "filed" by the Clerk's Office. However, because the Office was closed, no new 1991 docket number was assigned. In spite of this clerical error, this court both then and in connection with the current application for bail considered the petition as new, and separate and independent of any earlier petition.

At the March 12th hearing, petitioner argued to this court that he agreed with Judge Walsh's finding that petitioner had previously exhausted his claims for post-conviction relief in state court. Therefore, petitioner

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[2] Petitioner also argued that what was "new" in this third petition was the representation by the State made before Judge Walsh that petitioner had previously litigated his "new evidence" claims, in direct conflict with the State's arguments before the Third Circuit.

argued that he could not appeal Judge Walsh's order, since petitioner was repeatedly on record as agreeing with it. Accordingly, petitioner argued that he was now entitled to return to the federal courts for post-conviction relief.

Susan Gyss, representing the Hudson County Prosecutor's Office ("the State"), arrived at the March 12th hearing, having submitted responding papers that morning. Ms. Gyss informed the court that just prior to arriving in federal court for the hearing, the State had filed with Judge Walsh a petition for rehearing. Ms. Gyss represented that in those moving papers, the State contended that Mr. Landano was entitled to an evidentiary hearing, even though he should not succeed on the merits. In light of this new development, this court denied petitioner's order to show cause for emergency relief, since the court was of the opinion that the state court should have an opportunity to consider the State's motion for rehearing. However, the court did not dismiss the petition, which was properly filed. In the interim, while the habeas petition was pending and prior to the State's Answer or a Motion to Dismiss the Petition for Failure to Exhaust, the court entered a Consent Order[3] whereby the State agreed that, in the event the New Jersey Supreme Court's stay of the arrest warrant was vacated, Landano "shall not be

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[3] The parties orally entered into the consent order at the March 12th hearing. A proposed form of order was subsequently submitted, which was signed on April 11, 1991 and filed on April 12, 1991.

returned to custody untii notice has been given to petitioner, through his counsel, and this Court has an opportunity *to rule* upon such application as the petitioner may submit." (emphasis added).

Judge Walsh heard argument on the State's motion for rehearing on March 22, 1991. By his April 8, 1991 Letter-Opinion, apparently Judge Walsh granted the State's motion for rehearing and issued a superseding opinion, again denying Landano an evidentiary hearing and denying Landano's petition on the merits.[4] By Judge Walsh's direction, the State then moved before the New Jersey Supreme Court to vacate that court's stay of the arrest warrant for Landano. On May 1, 1991, the New Jersey Supreme Court vacated the stay without opinion and ordered that Mr. Landano could be arrested as of 5 p.m. on Thursday, May 2, 1991. Thus, with his 1991 habeas still pending, Mr. Landano filed the current motion for bail and for an order to show cause why his habeas petition should not be granted by this court.

Discussion

As expressed in this court's May 2, 1991 bench opinion, the court finds that the 1991 habeas petition is pending before the court. To this date, the State has neither answered the petition nor moved to dismiss it, despite the State's repeated contention that Mr. Landano has not yet exhausted his state remedies. As the court expressed at the hearing, after affording the parties a full and fair opportunity to address this issue the court may well conclude that petitioner has not exhausted his state

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[4] The court did not have the benefit of this opinion or of any other papers or briefs when the bail application was made.

remedies. However, the court could not make such a determination absent appropriate submissions.

Lucas v. Hadden, 790 F.2d 365 (3d Cir. 1986), governs petitioner's current motion for bail. In *Lucas*, a petition for a writ of habeas corpus was pending, although the court acknowledged that petitioner had not yet satisfied the exhaustion requirement. Petitioner's failure to exhaust did not affect the court's jurisdiction for purposes of granting bail; as the *Lucas* court noted, the exhaustion requirement is *not* jurisdictional. *Id.* at 367, *citing Strickland v. Washington*, 466 U.S. 668, 684 (1984). Although under 28 U.S.C. § 2254(b) a petition must be dismissed for failure to exhaust state remedies, a determination that a petitioner has not yet exhausted her state remedies is a determination on the merits of the petition. A court maintains jurisdiction over the petition pending that final determination. Neither an Answer or a Motion to Dismiss has been filed in this action, and the question of exhaustion, i.e., the impact of Judge Walsh's first March 1991 ruling, has never been briefed. The court therefore has jurisdiction to determine whether petitioner should be granted bail.

In *Lucas v. Hadden*, the Third Circuit stated that the "extraordinary circumstances" test is appropriate for determining whether a state habeas petitioner who has not exhausted state remedies is entitled to bail, recognizing that the preliminary grant of bail is an exceptional form of relief in a *habeas corpus* proceeding. In *Lucas*, the court acknowledged the inherent power of a federal habeas tribunal to admit a state petitioner to bail pending a ruling on the claims asserted in the petition. *Lucas*, 790 F.2d at 367, *citing* 28 U.S.C. § 2254(b).

The Third Circuit has not defined "exceptional" or "extraordinary" circumstances. The only case on record in which a federal court in this circuit has granted such bail is *Johnston v. Marsh*, 225 F.2d 528 (3d Cir. 1955), in which a petitioner was granted bail in order to receive treatment for diabetes. The instant case clearly presents exceptional and extraordinary circumstances which warrant the release of petitioner on bail. Although this court's writ of *habeas corpus* was reversed for failure to exhaust, and not on the merits, this court has already determined that petitioner may be innocent of the charges for which he was convicted.

Moreover, petitioner and respondent agree that the State of New Jersey provides no provision for bail pending resolution of an application for post-conviction relief in the state system. Accordingly, no matter how meritorious a petitioner's claim may be, and no matter what extraordinary and exceptional circumstances may arise which would warrant release on bail (e.g., medical necessity, etc.), no petitioner can be released on bail in New Jersey pending resolution of his petition.

Third, petitioner has been at large since this court issued the writ of *habeas corpus* on July 27, 1989, and, to the court's knowledge, has done nothing to suggest that he presents a risk of flight or a danger to the public. In fact, the state agrees that petitioner does not pose a risk of flight or a change to public safety. If anything, petitioner has demonstrated a commitment to "clearing his name", which requires him to endure the long and arduous course of legal process in New Jersey.

Finally, the actions of the Hudson County Prosecutor's Office, in requiring that this court act without benefit of a formal motion or briefing and in representing that it could not stop the arresting authorities from sending petitioner back to prison pending a hearing, also contribute to the circumstances which motivate this court's decision to grant bail pending receipt of the State's motion to dismiss the petition. The state's representations, including its representation that it would violate this court's order of March 12, 1991, which was entered by consent, strongly suggest that the state has acted at a level of bad faith sufficient to require this extraordinary form of relief.[5]

This confluence of factors strongly suggests to the court that this case presents "extraordinary circumstances" under *Lucas*, warranting the granting of bail for the limited purpose of affording the parties an opportunity to address, and the court an opportunity to decide,

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[5] On May 2nd while the court was in recess and just prior to the court's rendering of its determination on the bail application, the Deputy Courtroom Clerk received a telephone call notifying him that prison guards would be arriving momentarily to arrest Landano. The court then issued its ruling granting the bail application. At approximately 12:30 that day, just after the court rendered its ruling, two prison guards arrived at the court's chambers with handcuffs and leg irons seeking to take Mr. Landano into custody. These events occurred at least 4½ hours prior to the lifting of the stay of the arrest warrant by the New Jersey Supreme Court. The State's willingness to violate not only the consent order of March 12, 1991, but also the May 1st Order of the New Jersey Supreme Court was further evidence before the court of the State's bad faith in its handling of this matter.

the complex and novel issues of exhaustion raised by Landano's latest petition for relief.

Conclusion

Accordingly, bail is granted on the terms and conditions set forth in the court's order of May 2, 1991, and the Clerk of the Court is directed to assign a separate docket number to the petition filed on March 11, 1991 *nunc pro tunc*.

SO ORDERED.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: May 6, 1991

Original to: Clerk, U.S. District Court

Copies to: Ronald J. Hedges, U.S. Magistrate

Neil Mullin, Esq.
Smith, Mullin & Kiernan, P.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner, v. JOHN J. RAFFERTY, Superintendent East New Jersey State Prison, and ROBERT DEL TUFO, Attorney General of the State of New Jersey, Respondents.	Civ. No. 91-1881 (HLS) **OPINION** (ORIGINAL Filed Feb. 4, 1992)

Sarokin, District Judge

This case is a testament to the principle "Justice Delayed is Justice Denied." We must ask ourselves why the current clamor and rush to carry out death sentences, not no similar urgency in freeing one who might be wrongly convicted and confined.

Vincent James Landano has been up and down the judicial ladder enough times to exhaust anyone and destroy their spirit. Nonetheless, he has been ordered to resume the journey once again on the grounds that his current claims upon which this court granted him habeas corpus relief must receive further review by the state courts.

The futility and delay engendered by that process are self-evident. Either the state court will grant the relief which this court previously granted or, failing same, this

court will do so when the matter is returned to it – the same facts and law being presented. Thus, the petitioner, some one or two years hence, will be in the same position he was in on July 27, 1989, the day this court granted his petition. Then most certainly the appeals on the merits will commence.

Here is a man who has served over twelve years in prison and almost as many fighting for his freedom in our justice system. If one's liberty, once unconstitutionally taken, can only be restored after so many years of confinement and confoundment, then the Great Writ will be rendered worthless. Rather than crying out for speedy executions for those who have been convicted of capital crimes, we should be crying out for the prompt release of those who may have been wrongly convicted and confined – cries of freedom rather than death.

And now, despite all of the questions raised abut the petitioner's guilt and the prosecution's conduct, the State moves to have the petitioner returned to custody pending resolution of the state proceedings, by seeking dismissal of Landano's pending petition for habeas corpus relief.

Background

The factual and procedural histories of this case are long and complex. They have also been set out at length in previous opinions of this court and the Third Circuit issued at earlier stages of the present litigation.[1] The

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[1] This court's opinion of July 27, 1989 is set forth at 126 F.R.D. 627 (D.N.J. 1989). The Third Circuit's opinion, reversing this court's determination, is set forth at *Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 46 (1990).

court therefore incorporates its discussion of the factual and procedural background of this case in its opinions of July 27, 1989, May 2, 1991, and May 6, 1991.

It will be useful, however, to review briefly recent procedural events in this action to provide a context for the pending motion. After unsuccessfully pursuing a motion for a new trial and a petition for post-conviction relief in the state courts, petitioner Landano ("Landano") filed a petition for a writ of habeas corpus in this court. On September 29, 1987, this Court denied relief to petitioner, 670 F. Supp. 570 (D.N.J. 1987), *reconsideration denied*, 675 F. Supp. 204 (D.N.J. 1987), the Court of Appeals affirmed this decision, 856 F.2d 569 (3d Cir. 1988), and the United States Supreme Court denied certiorari. 489 U.S. 1014 (1989).

On June 8, 1989, petitioner sought and was granted an *ex parte* order by this court for the seizure of state files relating to this case. Based on information discovered in the seized files, Landano filed an Order to Show Cause with this court why a writ of habeas corpus should not issue. The court granted Landano's motion to reopen the court's prior judgment, pursuant to Rule 60(b), 126 F.R.D. at 638, found that Landano had satisfied his exhaustion requirements, *Id.* at 644, vacated its order denying Landano's petition, and issued a conditional writ of habeas corpus. *Id.* at 654. The court found that:

> New information has been presented to the court which demonstrates that evidence which may have exculpated the petitioner and inculpated another had been systematically withheld from the petitioner and his counsel.

Id. at 630. This information included a handwritten document from police files, indicating that two witnesses, one of whom testified for the prosecution at trial, had been shown only a photograph of Landano and failed to identify him as the perpetrator ("ID on Landano"); and a police department continuation report stating that a witness picked out a photograph of a different man, whom Landano had contended at trial to have been the perpetrator, as resembling a man seen driving the getaway car ("the Pasapas ID").

This court found that both documents had been suppressed and that either presented a substantial probability that the jury's verdict would have differed had the information contained within them been available to the defense at trial. Relying on *Brady v. Maryland*, 373 U.S. 83 (1963), the court concluded that Landano's fourteenth Amendment due process right to a fair trial had been violated by the prosecution's failure to turn over these documents, and that the suppression of each of them constituted an independent constitutional violation requiring granting of the writ. 126 F.R.D. at 654 & n.13.

The Court of Appeals for the Third Circuit reversed this determination, holding that Landano had failed to exhaust his state remedies with respect to the information uncovered in the seized files, and that no exceptional circumstances existed justifying suspension of the exhaustion requirement. 897 F.2d at 674-75. On November 1, 1990, Landano filed a new state petition for post-conviction relief. On November 15, 1990, the Supreme Court of New Jersey issued a stay of the arrest order for Landano, pending disposition of Landano's petition for post-conviction relief.

On February 4, 1991, defendants John J. Rafferty, Superintendent, East New Jersey State Prison, and Robert Del Tufo, Attorney General of the State of New Jersey, (collectively, "the State") filed an answer opposing Landano's petition. The grounds for their opposition, however, is disputed. Landano contends that defendants took the position that no state remedies were available to Landano for any of the issues addressed in his petition because all of them had been exhaustively litigated in prior state proceedings; the State now denies it argued that Landano had exhausted his state remedies. In a letter dated February 7, 1991, Landano indicated that he had argued before the Third Circuit that his state remedies were exhausted, but felt compelled by the third Circuit's mandate to seek a plenary hearing in state court. By letter dated February 7, 1991, the state responded, claiming that its prior submissions had not asserted that Landano had presented all his claims to the state court previously.

On March 8, 1991, the Honorable Maurice A. Walsh, Jr., J.S.C., dismissed Landano's petition without an evidentiary hearing. Landano contends that Judge Walsh's dismissal was based on a factual finding that all the claims Landano raised were barred as having already been litigated in the state courts. Based upon his view that this decision fulfilled the Third Circuit's mandate to exhaust his state remedies, Landano filed in this court on March 11, 1991 an order to show cause why a writ of habeas corpus should not issue, which this court treated as a new petition for habeas relief. Supplemental Opinion, No. 91-1881, Slip Op. at 3 (D.N.J. May 6, 1991) (Pet. Ex. at 1096A).

On March 12, before the scheduled hearing was to occur before this court, the State filed a notice of motion seeking a rehearing before Judge Walsh on the grounds that his prior decision had been defective in not recognizing that there existed a genuine unexhausted factual dispute concerning the "ID on Landano" and "Pasapas ID" documents, entitling Landano to a hearing on the merits. Because of the pendency of the State's motion for a rehearing, this court denied Landano's order to show cause, but did not dismiss the underlying petition. The State then consented on the record that no application would be made to arrest Landano until this Court had an opportunity to rule on his pending application.

On April 8, 1991, the Judge Walsh issued a second opinion, in which he stated that he had not previously held that the new issues raised by the "ID on Landano" and the "Pasapas ID" had been barred by previous state court litigation. Letter Opinion, Ind. No. 73-76, Slip Op. at 5-6 (N.J. Super. Ct. April 8, 1991) (Pet. Ex. 1009A-10A). Judge Walsh further stated that his earlier opinion had found, based on a "hearing on the merits," that the "so-called new issues" would not have caused any change in the guilty verdict, even if they were found to have involved prosecutorial misconduct. *Id.* at Slip Op. 3-4 (Pet. Ex. 1008A-09A). Hence, he stated, his denial of Landano's petition regarding the new issues had been on the merits, not due to their prior litigation. Judge Walsh then denied the state's motion for rehearing or clarification. Landano filed a notice of appeal of Judge Walsh's decision in the Appellate Division on May 14, 1991.

On April 19, 1991, the State moved before the New Jersey Supreme Court to dissolve its stay of the arrest

order. On May 1, 1991, the Supreme Court vacated the stay without opinion and ordered that Landano could be arrested as of 5 p.m., May 2, 1991.

The same day, Landano's counsel contacted this court to arrange a hearing, as had been contemplated when the parties appeared before the court on March 12, at which time the state had consented that "no application to place Mr. Landano in custody shall be made until notice has been given to [Landano's counsel] and an opportunity afforded to him to be heard by this Court." Transcript of Order to Show Cause Proceeding, No. 89-2454, at 3 (D.N.J. May 2, 1991) (Pet. Ex. 1061A). In order to arrange this hearing, the court scheduled a conference call with all parties for the following morning. In that conference, counsel for the State informed the court that the prosecutor would not honor its agreement and would not comply with the order, and claimed that it was without power, ability, or authority to prevent the arrest of Landano by the Department of Corrections.

Upon hearing that the state intended to act in contempt of this court's order, the court ordered all parties to appear before it at 10:00 a.m. on May 2, 1991, for argument. At that time, Landano filed an order to show cause why a writ of habeas corpus should not issue with temporary restraints in the form of federal bail. This court declined to rule on Landano's habeas petition on an exigent basis, but granted bail, issuing an opinion from the bench supplemented by a written opinion, issued May 6, 1991.

The State filed a notice of appeal and moved for stay of the bail order. The stay of the bail order has been

denied; the appeal of this court's order is currently pending before the Third Circuit.

On May 31, 1991, the State filed an answer to Landano's successive petition for habeas corpus, filed on March 11, 1991. The state's answer was accompanied by the motion to dismiss which the court addresses herein.

Discussion

Landano's renewal of his petition for habeas relief on March 11, 1991 was premised on his view that the Third Circuit's mandate that he exhaust available state remedies had been satisfied by the state court proceedings he instituted on November 1, 1990 Although Landano's appeal of the trial court's denial of his petition for post-conviction relief is still pending before the Superior Court of New Jersey Appellate Division, Landano contends that the exhaustion requirement has been satisfied by Judge Walsh's determination, in his first opinion, that "all issues" in Landano's state petition had previously been submitted to state court, and by the state's alleged initial position, in its answer to Landano's state petition, that Landano was barred because all of his claims had been adjudicated in prior state proceedings. Pet. Brief at 32.

The state has now moved to dismiss Landano's petition on the grounds that Landano has failed to exhaust his state remedies. The State disputes Landano's factual claims, contending that the State has never questioned that the "ID on Landano" and the "Pasapas ID" were new issues, not previously litigated in state court, and that Judge Walsh's first opinion recognized that these claims

were not exhausted.[2] Resp. Brief at 26, 28. Further, the State argues that Landano is not entitled to federal bail under the "extraordinary circumstances test" of *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986).

In opposition to the State's motion, Landano makes three arguments: (1) that in light of its initial position before Judge Walsh, the State is barred by the doctrine of judicial estoppel from asserting the non-exhaustion defense; (2) that comity requires this court to reach the merits, since both the State and the state courts have allegedly acted in bad faith to interfere with this court's jurisdiction; and (3) that petitioner is excused from the exhaustion requirement because the state judicial system, not providing any post-conviction relief in the form of bail, is ineffective to protect his rights. Pet. Brief at 46-56.

Exhaustion of State Remedies

The legal standard governing the availability of federal habeas relief is codified at 28 U.S.C.A. § 2254:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

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[2] Respondent also argues that Landano is time-barred from seeking relief under Fed. R. Civ. P. 60(b). Resp. Brief at 36.

> Any applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The court addresses the issues presented on this motion mindful of its responsibility to treat the Court of Appeals' decision as the law of the case, having reversed this court's earlier determination that exhaustion had occurred.

Judicial interpretation of the federal habeas statute has made clear that the exhaustion requirement is not jurisdictional, but "arises rather from interests of comity between the state and federal systems." *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 46 (1990) (citation omitted); *see also Rose v. Lundy*, 455 U.S. 509, 515 (1982) (comity is the basis for the exhaustion doctrine). Nevertheless, although not jurisdictional, the exhaustion rule is "to be strictly enforced." *Strickland v. Washington*, 466 U.S. 668, 679 (1984).

Under this standard, the court finds Landano's arguments regarding the merits of his petition unconvincing. First, Landano has not established he is entitled to exemption from the exhaustion requirement based on an "absence of available state process" or "circumstances rendering such process ineffective." Judge Walsh's April 8 Opinion makes clear that Landano's petition for post-conviction relief based on the newly discovered evidence was denied on the merits. The ordinary state appellate process is now available to Landano; indeed, he has already filed an appeal.

The general rule of requiring exhaustion where a state corrective process is available is not "rigid and inflexible." As the United States Supreme Court has said, "district courts may deviate from" the general rule requiring exhaustion and "grant relief in special circumstances:"

> Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals.

Frisbie v. Collins, 342 U.S. 519, 520-21 (1952). Landano, however, has not demonstrated a basis for waiving the exhaustion requirement under *Frisbie's* "special circumstances" test. As the Third Circuit said, " '[e]xhaustion- . . . serves an interest *not* of state prosecutors but of state courts;' . . . [t]herefore, an exception 'punishing' the prosecutor for misconduct by withholding the exhaustion defense would clearly not serve the interest of comity." *Landano*, 897 F.2d 661 (*quoting U.S. ex rel. Trantino v. Hatrack*, 563 F.2d 86, 96 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978)) (rejecting view that systemic, bad faith suppression of exculpatory evidence constitutes waiver of non-exhaustion argument). Regarding Landano's argument that the State is judicially estopped from raising non-exhaustion, the court observes that the exhaustion requirement is premised on respect for the state courts and is not based upon the arguments or actions of the prosecution. Hence, even if the state has taken inconsistent positions before federal and state courts which might, in other circumstances, bar it from raising a defense, such conduct would not by itself excuse this

court from determining whether plaintiff has exhausted his state remedies. *Cf. Granberry v. Greer*, 481 U.S. 129, 133 (1987) (state's failure to raise non-exhaustion defense until appeal of adverse habeas determination in district court did not constitute absolute waiver).

Likewise, the comity doctrine itself does not require this court to disregard the availability of state process as Landano contends. Once again, a prosecutor's failings, whether in suppressing exculpatory evidence or taking inconsistent positions before different courts, cannot justify this court in refusing to defer to the state courts on matters properly within their jurisdiction, where they have not yet had an opportunity to pass on the matter. *See Ex parte Hawk*, 321 U.S. 114, 118 (1944). This court also finds no basis for denying deference to the state court by virtue of the fact that a superseding opinion appears to contradict a prior one, no matter how markedly.

Finally, Landano has not carried the burden of establishing that he has in fact exhausted his state claims. This court has no grounds for disregarding Judge Walsh's opinion of April 8, 1991, in which he clearly stated that consideration of the "ID on Landano" and "Pasapas ID" issues was not precluded under the New Jersey rule barring relitigation where a ground of relief has been determined on the merits in a prior adjudication. N.J. Rule Crim. P. 3:22-5. Landano is not precluded from appealing Judge Walsh's adverse determination in the state courts.

Federal Bail

The court therefore concludes that Landano has failed to exhaust his state remedies with regards to claims based on the "ID on Landano" and "Pasapas ID" documents. Landano's exclusive avenue for pursuing these claims lies, for the present, in the state courts. The availability of bail, however, raises a different issue. The Third Circuit has recognized "the inherent power of a federal habeas tribunal to admit a state petitioner to bail pending a ruling on the claims asserted in the petition." *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986) (*citing United States ex rel. Slough v. Yeager*, 449 F.2d 755 (3d Cir. 1971); *Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955)). In the Third Circuit, the "extraordinary circumstances" test provides the "standard by which to determine when bail may be granted to a habeas petitioner prior to a ruling on the merits of the petition." *Lucas*, 790 F.2d at 367.

Thus, in *Johnson v. Marsh*, federal bail was granted where a petitioner was extremely ill and sought to be admitted to a hospital pending resolution of his habeas petition. 227 F.2d 528; *see also Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972). Further, the Third Circuit has made clear that a habeas petitioner's poor health is not the only extraordinary circumstances "that may justify a grant of bail prior to disposition of the habeas petition." *Lucas*, 790 F. 2d at 367. Other circuits, for example, have indicated that "extraordinary circumstances" may include short sentences too near their completion to make collateral review an effective remedy, *see, e.g., Calley v. Callaway*, 496 F.2d 701, 702 n.1 (5th Cir. 1974), *application denied*, 418 U.S. 906 (1974); *Noyd v. Bond*, 395 U.S. 683, 689 (1969); *Levy v. Parker*, 396 U.S. 1204 (1969); *Boyer v. City of*

Orlando, 402 F.2d 966 (5th Cir. 1968), and extraordinary delay in processing a habeas petition. *Glynn v. Donnelly*, 470 F.2d 95 (1st Cir. 1972); *cf. Landano*, 897 F.2d at 675, n.23 (inexcusable or inordinate delay by the state in processing petitioner's claims for relief would permit petitioner to seek relief in federal court notwithstanding failure to exhaust state remedies).

In its prior opinion ruling on Landano's request for bail, this court found that Landano's case "clearly presents exceptional and extraordinary circumstances which warrant the release of petitioner on bail." *Landano v. Rafferty*, Supplemental Opinion and Order, Civ. No. 91-1881 (D.N.J. May 6, 1991), Slip Op. at 7 (Pet. Ex. 1100A). This court's May 6 opinion listed four factors cumulatively satisfying *Lucas'* "extraordinary circumstances" test. First, this court has already determined, in its opinion of July 27, 1989, that petitioner may be innocent of the charges for which he was convicted; accordingly petitioner has in the view of this court a likelihood approaching certainty of success on the merits.[3] Second,

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[3] For a discussion of the merits of Landano's petition, based on the newly discovered evidence, see *Landano v. Rafferty*, 126 F.R.D. at 644-54. The Third Circuit has stated that "[w]e doubt that it is appropriate to grant bail prior to ruling on a state habeas petition solely on the ground that there is a high likelihood of success on the merits, especially absent exhaustion of state remedies." *Lucas*, 790 at 367. However, this court finds it significant that the Circuit court did not state that likelihood of success was irrelevant to the appropriateness of bail. To the contrary, the carefully qualified conclusion that the granting of bail "*solely* on the ground that there is a high likelihood of success on the merits" is inappropriate, implies

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"petitioner and respondent agree that the State of New Jersey makes no provision for bail pending resolution of an application for post-conviction relief in the state system." Slip Op. at 7. Third, "petitioner has been at large since this court issued the writ of *habeas corpus* on July 27, 1989, and, to the court's knowledge, has done nothing to suggest that he presents a risk of flight or a danger to the public." *Id.* at 8. Fourth, respondent's actions themselves provided a reason for extending bail:

> . . . the actions of the Hudson County Prosecutor's Office, in requiring that this court act without benefit of a formal motion or briefing and in representing that it could not stop the arresting authorities from sending petitioner back to prison pending a hearing, also contribute to the circumstances which motivate this court's decision to grant bail pending receipt of the State's motion to dismiss the petition. The State's representations, including its representation that it would violate this court's order of March 12, 1991, which was entered by consent, strongly suggest that the state has acted at a level of bad faith sufficient to require this extraordinary form of relief.

Slip Op. at 8.

(Continued from previous page)

that the strength of petitioner's argument on the merits is properly taken into account as a factor to be weighed in determining the availability of bail, albeit not a sufficient ground in itself. Further, *Lucas* is distinguishable because the petitioner's claim therein did not involve allegations of egregious prosecutorial misconduct, as have been raised here.

Based on these factors, this court concluded that:

> [t]his confluence of factors strongly suggests to the court that this case presents "extraordinary circumstances" under *Lucas*, warranting the granting of bail for the limited purpose of affording the parties an opportunity to address, and the court an opportunity to decide, the complex and novel issues of exhaustion raised by Landano's latest petition for relief.

Id.

The benefit of further briefing on the legal and factual issues in this case have further satisfied the court that the four extraordinary factors identified in the court's May 6 opinion were factually and legally sound, and continue to apply to petitioner with undiminished force. Accordingly, the court concludes that the *Lucas* "extraordinary circumstance" test is no less satisfied now then when Landano presented his emergency application for bail to this court in May 1991.

Moreover, the court concludes that the basis for extending bail to Landano is stronger than the court recognized at the time it issued the May 6 opinion. First, after having a fuller opportunity to review the applicable state law, the court is convinced that, except in circumstances that do not apply here, no interim bail remedy is available in New Jersey pending post-conviction review.[4] Second, the intervening months have provided further

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[4] See discussion *infra*.

evidence that petitioner presents neither a risk of flight nor a danger to the public.

Third, and most significant, the court has concluded that the behavior of the State before this tribunal is to be condemned for a reason beyond those cited in the May 6 opinion. More than merely indicating prosecutorial bad faith, the pattern of misrepresentation and disrespect for the orders of this court and the New Jersey Supreme Court displayed by the state in connection with the May 2 hearing represent a course of conduct that may contribute substantially to delays in efforts by petitioner to attain timely final resolution of his claims. Such prosecutorial maneuvering could, if encouraged, have the effect of contributing to inordinate delays in the processing of petitioners' claims for relief. Such delay has been recognized as a separate ground for granting post-conviction bail, *see Glynn v. Donnelly*, 470 F.2d at 99 ("extraordinary delay" by district court might justify appellate court in granting federal bail to habeas petitioner), and even for waiving the exhaustion requirement and entertaining an unexhausted habeas petition on the merits. *See Landano*, 897 F.2d 675 n.23 (delay by state court). While the court does not go so far as to find the State's behavior a basis for considering the petition on the merits, the court is satisfied that the potential for delay inherent in the State's behavior is an independent "extraordinary factor" weighing in favor of granting federal bail in this case.

The question that remains to be addressed is whether the court's determination that Landano has failed to exhaust his underlying claims precludes the court from continuing to extend federal bail. Because the court concludes that it is not so precluded, it will order that

Landano's bail be continued, pending the appeal of his claims in the state courts.

In reaching this conclusion, the court is guided by the fact that the Third Circuit has clearly contemplated a situation in which a federal court may retain jurisdiction of a habeas petition in order to extend bail, even though the petitioner has failed to exhaust his state remedies. *See Lucas v. Hadden*, 790 F.2d at 367. In *Lucas* itself, for example, the district court had ordered petitioner to exhaust his state remedies while deferring ruling on the merits of his petition and admitting him to bail pending exhaustion of his claim in the state courts. *Id.* at 366. Further, at the appellate level in *Lucas*, it was conceded that petitioner had not exhausted state remedies, yet, in denying him bail, the circuit court reached the issue of the appropriate standards for federal bail, rather than merely dismissing his bail application based on his failure to exhaust his underlying claims. *Id.* It may be that the class of cases permitting such an arrangement is minuscule, particularly because, as the Third Circuit has indicated, non-exhaustion of state remedies is itself a factor weighing against the granting of federal bail. *Id.* However, the court concludes that where sufficient "extraordinary circumstances" exist, a federal court will be justified in granting bail notwithstanding petitioner's failure to exhaust; and the court is satisfied that the present action easily falls within this class of cases.

Further, the court concludes that, although petitioner has failed to exhaust his state remedies on his claims for permanent relief, he is properly excused from the exhaustion requirement with respect to his claims for interim relief, based on the "absence of available state corrective

process." 28 U.S.C.A. § 2254. As both parties have recognized, New Jersey law does not provide for relief in the form of bail in post conviction proceedings.[5] New Jersey courts have held that "while a defendant before trial has a constitutional right to bail, any right to bail after conviction must be statutory." *State v. Garcia*, 193 N.J. Super. 334, 338 (App. Div. 1984). It is this court's view that no New Jersey statute authorizes bail in a post-conviction proceeding such as this. In *State v. Rose*, 88 N.J. Super. 86 (Law Div. 1965), the Law Division held that a defendant was not entitled to release on bail pending resolution of a post-conviction proceeding, since no specific court rule affirmatively provided for such relief. The only rule providing for post-conviction bail, now Court Rule 2:9-4, provides for bail "[p]ending appeal to the Appellate Division." The *Rose* court interpreted this rule as allowing bail only pending the prosecution of an appeal before an appellate court, not in a motion for post-conviction relief. *See also State v. Smith*, 43 N.J. 67, 74 (1964), *cert. denied*, 379 U.S. 1005 (1965) ("a post-conviction proceeding may not be used as a substitute for an appeal from a judgment of

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[5] *See* Supplemental Opinion, May 6, 1991, Slip Op. at 7 (Pet. App. at 1094A); Respondent's Letter Memorandum to the New Jersey Supreme Court, Indictment No. 73-76, March 11, 1991, at I & XIII (Pet. App. at 967A & 979A) ("bail is not available during the pendency of a Petition for Post-Conviction Relief;" "[i]n summary, the defendant does not enjoy a constitutional right to post-conviction bail; the bail statutes are void of any provision which defendant might rely upon, and the New Jersey Rules of Court provide no guidelines or procedures that would permit the defendant to prosecute a post-conviction relief application while admitted to bail").

conviction"). This interpretation has been followed by other New Jersey courts. *See, e.g., State v. Cavanaugh*, 174 N.J. Super. 90, 94 (Resentencing Panel 1979) ("[a] defendant, prior to conviction, generally has a right to bail, not merely by rule (R. 3:26-1), but by force of Constitution. After conviction in the event of appeal, he has the right to bail only under the specific circumstances set forth in R. 2:9-4. . . . No provision is made for bail in post-conviction relief applications") (*citing State v. Rose*).

In petitioner's state court proceeding itself, Judge Walsh denied bail on the grounds that "[i]n New Jersey it seems that bail is not available in [post-conviction relief] petitions." Transcript of Court's Opinion, Indictment No. 73-76, at 23 (Superior Court, Law Div. November 7, 1990) (Pet. App., State Court Transcripts, Ex. 2). Based on a review of the state authorities, Judge Walsh concluded that "there is no bail available in a case such as this one which I am attempting to decide." *Id.* at 24 (*citing State v. Rose*, 88 N.J. Super. 86). On November 7, 1990, the Appellate Division affirmed Judge Walsh's denial of bail without opinion. On November 15, 1990, the New Jersey Supreme Court took the unusual step of staying Landano's arrest pending disposition of his petition for post-conviction relief. Order, No. M-407/408/409 (Sup. Ct. N.J. Nov. 15, 1990) (Pet. App. at 1107A-08A). However, the Supreme Court dismissed as moot Landano's motion for bail, thus making clear that the extraordinary relief it had afforded Landano was not premised on any right under state law to bail pending pursuit of post-conviction relief. Accordingly, the court concludes that under the present state of New Jersey law, bail is not available in a petition for post-conviction relief. Hence, petitioner's failure to

exhaust his state claims for permanent relief is no bar to this court providing him relief with respect to claims for interim relief, for which there is no state corrective process.

Further, the court finds it significant that the concern for comity between state and federal courts, which underlies the exhaustion doctrine, is not implicated by granting bail to petitioner. *Strickland v. Washington*, 466 U.S. 668, 679 (1984); *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir. 1990). There would be no point in sending Landano back to the state system to pursue bail relief which is unavailable there. Nor, under comity principles, is there any affront to the state courts in this court retaining jurisdiction solely in order to extend bail, since New Jersey courts could not "pass upon the matter" in any case. *Rose v. Lundy*, 455 U.S. 509, 518 (1982) ("the doctrine of comity . . . 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter'") (*quoting Darr v. Burford*, 339 U.S. 200, 204 (1950) (citation omitted).

Moreover, this court has already reviewed and passed upon the appropriateness of releasing petitioner on federal bail. *Cf. Granberry v. Greer*, 481 U.S. 129, 135 (1987) ("if a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred, it may also be appropriate for the court of appeals to hold that the non-exhaustion defense has been waived in order to avoid unnecessary delay in granting relief that is plainly warranted"). Accordingly, the ends of respect for state judicial process, justice, and judicial

economy are best served by relying on and reaffirming the previous determination of this court, that petitioner has satisfied the high standard required for the granting of federal bail pending disposition of post-conviction relief proceedings.

The court concludes that the non-exhaustion and comity doctrines mandate that this court should not proceed to the merits of petitioner's claim until he has presented the unexhausted new issues, as identified by the Third Circuit, to the state courts and pursued all applicable appellate procedures therein. However, the court further finds that the principle of comity also permits this court to continue bail to petitioner while he pursues his state remedies. Therefore, this court will retain jurisdiction for the limited purpose of affording petitioner bail, but stay all other proceedings before this court until such time as petitioner has fully exhausted his state remedies.

Conclusion

For the foregoing reasons, respondent's motion to dismiss is denied, petitioner's grant of bail is renewed, and this action is otherwise stayed, pending petitioner's exhaustion of appropriate state remedies.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: February 4, 1992

Original to: Clerk, U.S. District Court

Copies to: Joel A. Pisano, U.S. Magistrate Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner, v. JOHN J. RAFFERTY, Superintendent East New Jersey State Prison, and ROBERT DEL TUFO, Attorney General of the State of New Jersey, Respondents.	Civ. No. 91-1881(HLS) **ORDER** (Filed Feb. 4, 1992)

This matter having come before the court upon the motion of respondents to dismiss petitioner's petition for

the writ of habeas corpus; and the court having considered the submissions of the parties; and for the reasons expressed in the accompanying opinion; and for good cause shown,

IT IS this 4 day of February 1992, hereby

ORDERED that respondent's motion to dismiss petitioner's petition for the writ of habeas corpus be and hereby is denied; and it is further

ORDERED that petitioner be continued on bail on the terms and conditions set forth in the court's order of May 2, 1991; and it is further

ORDERED that this action is otherwise stayed, pending petitioner's exhaustion of appropriate state remedies.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.